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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1923.

No. 232.

ATCHISON, TOPEKA & SANTA FE RY. CO. - - - *Appellant*

vs.

EDMUND R. WELLS, ET AL - - - - - - - - *Appellees.*

BRIEF FOR APPELLEES.

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Attorneys for Appellees.

ELLIS BROS. PRINT

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BRIEF FOR APPELLEES.

Appellant's statement that all allegations of its bill were sustained by the agreed facts on which the case was tried, is not accepted as correct. The allegation of unlawful conspiracy to unduly burden appellant by wrongfully bringing damage suits against it in the courts of Texas, is not sustained. The agreed fact on that issue is in Par. 11 Print. Rec. 42. The answer of the garnishee admitted it was indebted to appellant $150,000.00, traffic balances for interstate freight, and it was because of this indebtedness that the state court entered judgment and awarded execution against the garnishee. Such judgment impounded no specific property or funds belonging to appellant. See Par. IV answer of garnishee. Print. Rec. 27; Judgment against garnishee Print. Rec. 31-32. It was agreed that such funds would have been used by appellant in

the conduct of its interstate and in its intrastate business in other states. Par. 8th Print. Rec. 39. No personal judgment was rendered in the State Court against appellant. Print. Rec. 30-31. There was no showing that such funds were necessary in the conduct of its interstate business.

I.

Appellant's first proposition is that the Texas statutes did not authorize a garnishment upon an unliquidated demand, and therefore the judgment against the garnishee is void. If such judgment be void, it is no lawful excuse for the garnishee's refusal to pay appellant what is owing; appellant has adequate remedy at law for its debt, and is not entitled to file this bill in equity. But even if the State court was in error in construing the Texas Statutes as authorizing the garnishment, this was error of law that should have been corrected by appeal, and can't be urged in this collateral proceeding as a reason to declare the judgment void. Bank of Cumberland v. Simpson (Ky) 77 SW 695; Am. Exp. Co. v. Mullins 212 U.S. 311; Wagley v. Wagley (Tex) 230 SW 493.

But the Texas statutes authorized the garnishment. Art 271 of Texas Rev. Stat. of 1911, so far as material reads:

"The clerks of the district courts x x x, may issue writs of garnishment returnable to their respective courts in the following cases:

1. Where an original attachment has been issued as provided in the foregoing chapter.

2. Where the plaintiff sues for a debt and makes affidavit, etc.

3. Where the plaintiff has a judgment and makes affidavit," etc.

It will be noticed that ground one authorized a garnishment in any case where an original attachment has been legally issued "as provided in the foregoing chapter," which is Chap one of title 11 of said revision. While it is true that

prior to 1913 such attachment could not issue in an action for damages for tort, this was remedied by Act of 1913 Leg. copied on pp. 13-14 of appellant's brief, which act by its terms is expressly made a part of said Chap. one, as article 247a thereof. The original attachment having rightfully issued, the garnishment was authorized, according to the literal terms of the statute. It is a rule of statutory construction that the grounds for attachment having been enlarged by subsequent legislation, the right to garnishment under existing statutes, dependent solely upon the issuance of an attachment, automatically becomes enlarged. Kuger's Appeal 55 Pa. St. 123; Cole v. Circuit Judge (Mich) 64 NW 741; Gaston v. Lamkin (Mo) 21 SW 1100. Paragraph one of the garnishment statute above quoted, Art. 271, has never required that the attachment must have issued upon a liquidated demand or for debt. There was no occasion for the legislature to amend the statutes further, in order to authorize a garnishment in any case where an original attachment had issued. It was not necessary that the attachment be levied or returned, to authorize the garnishment. Wilson v. Anderson (Tex) 54 SW 928; 23 Cyc. 360, note 8; Pease v. Richie 24 NE 433.

II.

Appellant's second contention, brief 21, is that no valid judgment can be rendered against the garnishee till there is a valid personal judgment rendered against the defendant, which could not be done in this case because defendant was a non-resident and did not appear. This is fully answered in Harris v. Balk 198 U. S. 215 and the following Texas cases: Wilson v. Anderson 54 SW 928wr; Grizzard v. Brown 22 SW 252; Studebaker v. Gerlach 192 SW 545; Goodman v. Henley 80 Tex. 499, 16 SW 432; Berry v. Davis 77 Tex. 191, 13 SW 978; Ry v. Swartz 115 SW 275wr. Art 293 Tex. Rev. Stat. expressly authorizes a personal judgment against the

garnishee where it is indebted to the defendant.

III.

Appellant's third contention, brief 28, amounts to this; that the judgment against the garnishee should be enjoined because a debt owing to it by the garnishee growing out of interstate traffic balances cannot be garnished at the residence of the garnishee where the plaintiff and defendant are non-residents of that state and the cause of action did not arise there. We answer as follows:

1. If the debt garnished was not subject to garnishment, the garnishee owed appellant the duty, either (a) to give timely notice to appellant and request it to defend the garnishment, or (b) set up the exemption in its answer and prosecute this defense by appeal to the court of last resort. Not having done either, the judgment against the garnishee and payment of it, cannot be urged by the garnishee as a defense, when sued by the appellant for the same debt. Ry. v. Whipsker 77 Tex. 14, 13 SW 639; Barber v. Bank (Tex. Civ) 218 SW 156 wr 226 SW xv; Trammel v. Ullman 96 SW 648; American Exp. Co. v. Mullins 212 U. S. 311; Chicago, R. I. & P. Ry. v. Sturm 174 U. S. 710; Harris v. Balk 198 U. S. 215; Day v. Barnham 82 Mo. Ap. 543; St. L. & S. F. Ry. v. Crews (Okla) 151 P. 879; So. Ry. v. Fulford 125 Ga. 103, 5 Ann. Cas. 168 & note;

There being nothing to show that appellant knew of the garnishment, or that the garnishee notified appellant thereof or requested it to defend against the same, and altho the garnishee did set up the exemption of the fund, it submitted to an erroneous judgment in the trial court, when it could have been relieved from such judgment by appealing upon the face of the record; if not sooner, at all events when the case reached this court, has now lost the right by its own negligence and folly, to set up the garnishment judgment as a defense to a suit against

it by appellant, for the same debt. Such garnishment judgment would not be a defense to the suit of appellant in the Texas court, under the holding in Ry. v. Whipsker 77 Tex. 14. The full faith and credit clause in the Constitution and in R. S. Sec. 905 is not violated; leaving appellant free to compel payment from the garnishee, the same as if no garnishment had issued. It is the theory of our judicial system, both national and state, that errors of law in the judgments of trial courts should be corrected by appeal and not by collateral injunctions.

2. The garnishee was a necessary party to this suit, without which the court could in no event grant appellant an injunction. Harwood v. Ry. 17 Wallace 78; Wickliffe v. Eve 17 Howard 470.

3. The debt owing by the garnishee for traffic balances on interstate freight is subject to garnishment. Davis v. Ry. 217 U. S. 157; International Harvester Co. v. Kentucky 234 U. S. 579.

It is not within the power of the federal courts to prescribe what shall be the policy of the state courts. If there be a difference in such policy, that would not justify federal courts in enjoining the judgment of state courts. Congress has not prohibited suits against railroads doing interstate business, nor undertaken to regulate such suits, except in instances not applicable here. Davis v. Ry. 217 U. S. 157, decided April 1910, expressly held that traffic balances arising from interstate hauls were subject to garnishment in a suit like this. Several times since then Congress has considered and past legislation affecting interstate carriers, presumably with full knowledge of that holding, and it should be assumed that Congress approved such policy, until it has expressly legislated to the contrary. The policy outlined by the President during Government control, referred to in the recent case of Davis v Farmer's Cooperative Equity Co., decided by this court May 24, 1920, prohibiting the bringing of suits in foreign or re-

mote jurisdiction, and the war-time act of Congress taking Government control of railroads and prohibiting all judicial seizures of railroad properties, died with the ceasing of Government control. The act of Congress, the Transportation act, turning the railroads back to their owners, is strong presumptive evidence that Congress did not mean to continue such policies. It is not to be supposed that Congress would have left such an important matter as exempting such funds from attachment to mere inference.

Altho alluded to in the last cited case, we don't see force in the argument that the defandant may complain because the suit is not brought at the residence of the plaintiff. In fact the Federal Constitution gives every citizen of the United States the same rights in the courts of Texas that a citizen of Texas has. Sec. 2 Art. IV; Sec. 1, 14th Amendment. By the local law, non-residents have always been accorded the full rights in the Texas courts which residents have. Ward v. Lathrop 11 Tex. 287; Grizzard v. Brown (Tex) 22 SW 252. This holding is within the policy of the holding in Harris v. Balk 198 U. S. 215;

The cause of action was transitory and could be sued on anywhere the defendant could be found, or its property seized. Tenn. Coal, I. & R. Co. v. George 232 U. S. 354; A. T. & S. F. Ry. v. Sowers 213 U. S. 55; Dennick v. Ry. 103 U. S. 11; St. L. S. W. Ry. v. Smitha (Tex. Sup) 232 SW 404; Rivera v. Ry. (Tex) 149 SW 223; G. C. & S. F. Ry v. Beezley (Tex) 153 SW 651.

There is not evidence that the funds garnished were necessary to enable appellant to carry on its interstate business, or in fact any other business conducted by it. For all that the court knows, the defendant was in a position to have declared these funds out in dividends to its stockholders, or have donated them to charitable uses. A dollar earned in interstate traffic has no more value to appellant than has a dollar

secured in any other way. A dollar so earned is not accompanied with any public trust. For aught that appears, the debt of the garnishee to appellant may have been funds allowed to accumulate for several months and voluntarily left on deposit with the garnishee. The rule is of too long standing and well settled in well nigh if not in all of the States, that a non-resident may be sued to the extent that his effects may be seized by court process, to now be overturned except by legislation. The courts have never felt justified in restraining the seizure of railroad property by court process, except in receiverships or other insolvency proceedings and then only temporarily.

The debt garnished had ceased to have any of the elements of interstate commerce. The haul had been compled, delivered to the consignee and paid for. It thereafter was a simple, ordinary debt owing by the garnishee to appellant. If the court has the right to hold that appellant's effects in Texas should not be seized by court process then it may hold that its effects cannot be seized by such process in any other state, not even in the state of its residence. If we once embark to any extent upon such a policy, like riding an unruly horse, we can't know where it will end.

4. The appellant had the right to appear, become a party to the garnishment suit and claim the exemption of the debt from garnishment. Ry. Whipsker 77 Tex. 14. It may be assumed appellant had notice of the garnishment in time to have appeared and made the contest, since neither its bill or proof negatives such notice. If it had such notice it should have taken such action. Not having done so, the present bill is wanting in diligence, good faith and the necessity of resorting to equity.

5. The State court had jurisdiction over the person of the garnishee and having rendered a personal judgment against it, such judgment is valid in this collateral attack; if there was